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738-007—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 180

HENRY GIORDANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A) affirming the conviction without opinion is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1964. The petition for a writ of certiorari was filed on June 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury could properly find petitioner guilty of attempting to collect a bribe to settle an alleged violation of revenue laws, and acquit him of

demanding an unauthorized payment to perform his duty.

2. Whether the evidence of criminal intent was sufficient to sustain petitioner's conviction for mutilating an Internal Revenue Service document.

3. Whether a miniphone recording of a conversation between petitioner and a witness was properly admitted into evidence to corroborate the witness' testimony.

4. Whether petitioner was prejudiced because government counsel, in cross-examination and summation, used a transcription of the miniphone recording.

STATUTES INVOLVED

18 U.S.C. 2071 reads:

> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.
>
> (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office

and be disqualified from holding any office under the United States.

Section 7214 of the Internal Revenue Code of 1954 (26 U.S.C. 7214) provides in pertinent part:

> (a) *Unlawful acts of revenue officers or agents.*—Any officer or employee of the United States acting in connection with any revenue law of the United States—
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> * * * * *
>
> (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or
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> * * * * *
>
> (9) who demands, or accepts, or attempts to collect, directly or indirectly as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do;
>
> shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner, an officer of the Internal Revenue Service, was convicted on counts which charged that he unlawfully mutilated an affidavit deposited by one Martha

Thompson with the revenue service (18 U.S.C. 2071) and that he attempted to collect a bribe of $6,000 from one Marion W. Lohse for the adjustment of an alleged violation of the revenue laws (26 U.S.C. 7214(a)(9)) (R. I. 5–7). Petitioner was acquitted on a count which charged that he demanded the sum of $6,000 from Lohse in violation of 26 U.S.C. 7214 (a)(2) (R. I. 6). Petitioner was sentenced to imprisonment of 18 months on each count, the terms to run concurrently (R. I. 1–3). The court of appeals affirmed without opinion (Pet. App. A).

1. The government's evidence may be summarized as follows: Martha Thompson, a married woman with children who was separated from her husband, had known Marion Lohse, a sea captain, for 32 years (R. I. 8–9). Captain Lohse lived with Mrs. Thompson since 1942 and was the sole support of Mrs. Thompson and her family (R. I. 9, 12, 31).

In March 1962, Mrs. Thompson received a letter from the Internal Revenue Service, signed by petitioner, informing her that the Service had no record of her having filed an income tax return for 1960 and advising her to report to the Service office (R. I. 10). Mrs. Thompson called petitioner to explain that she was not employed. In the course of the conversation she volunteered that she had signed joint returns filed by Captain Lohse, who was then out of the country (R. I. 12). Petitioner instructed Mrs. Thompson to report to his office (R. I. 13).

On April 5, 1962, when Mrs. Thompson reported to petitioner's office, he questioned her extensively

about her assets, including the value of any bonds, insurance, real estate, and other property (R.I. 14, 15). He then asked her if she could withdraw $5,000 from the bank and told her he would meet her in the bank in an hour (R.I. 17–18). When Mrs. Thompson said she did not understand what he was asking, petitioner told her to think it over during the weekend and to call him on Monday (R.I. 18).

Mrs. Thompson called petitioner at the designated time and told him that she would not have wilfully withheld payment of any money due the government and was willing to pay it now (R.I. 18). Petitioner then insisted that she come to his office and sign a statement. On April 12 she signed a statement incorporating the information which she had given petitioner as to her marital status and assets and the fact that she had filed joint returns with Captain Lohse (R.I. 19–22). Petitioner witnessed the signing of this affidavit, kept the original and gave her a copy (R.I. 22–23).

In May 1962, Captain Lohse was informed by Mrs. Thompson that his tax returns were being investigated and that he had been requested to communicate with petitioner (R.I. 32). Lohse thereupon made an appointment with petitioner for July 31 (R.I. 33).

When Lohse reported to petitioner's office, petitioner drew from him the admission that he had instructed Mrs. Thompson to sign the joint returns (R.I. 33). Petitioner then instructed Lohse to return the following morning and said, "this is a serious situation but I want to help you" (R.I. 34).

On the following morning petitioner told Lohse that he owed $54,000 in income tax, $8,000 in interest, and a 100 percent penalty for filing fraudulent returns (R.I. 34). He requested Lohse to meet him in the street, where he told Lohse that he would settle the matter if Lohse would pay him $10,000. Lohse replied that he would think it over, and petitioner said, "Well, Captain, many times it is better to make a quick decision than to think things over too long" (R.I. 35).

Lohse went to his bank and withdrew $10,000, but decided to see his attorney before proceeding further. His attorney referred the matter to the Internal Revenue Service (R.I. 36–37).

On August 16, 1962, Internal Revenue inspectors attached a miniphone recording device to the person of Captain Lohse (R.I. 37). The captain met petitioner at a restaurant, as previously arranged, and petitioner suggested that they go to his car (R.I. 39). In the car, with petitioner driving, the two men discussed the payment of the money to petitioner. Lohse said that he had brought $5,000. Petitioner asked for $6,000, saying that he had someone else to consider (R.I. 40).

At one point during the meeting, petitioner, becoming apprehensive that he was being followed, took from Lohse the original copy of the affidavit which Mrs. Thompson had signed and which petitioner had notarized. Petitioner tore the left hand corner of the affidavit which bore his signature, returned the affidavit to Lohse, and then took it back again (R.I. 41). Shortly before his arrest, when he saw he was

being followed, petitioner accused Lohse of attempting to bribe him and attempted to discover if Lohse had a recording device on his person (R.I. 42).

2. After Captain Lohse had testified, the court permitted the miniphone recording to be played to the jury (R.I. 92) over petitioner's objection that the recording was not accurate (R.I. 82–83) and that its use compelled petitioner to give evidence against himself (R.I. 90).

3. Petitioner's defense was that Lohse was attempting to bribe him (R.I. 132, 135, 139). He admitted that he did not report the alleged bribe attempt (R.I. 132, 134), and that he tore the affidavit, but claimed that he had torn the document merely to test Lohse's reaction (R.I. 142).

ARGUMENT

1. There is no merit to petitioner's contention that the verdict of the jury in acquitting him of demanding money for performance of his duty and finding him guilty of attempting to collect a bribe is inconsistent. The short answer is, of course, that consistency is not required in a jury verdict. *Dunn* v. *United States*, 284 U.S. 390, 393; *United States* v. *Dotterweich*, 320 U.S. 277, 279. In any event, there was no inconsistency in this case. On the basis of the record the jury could properly conclude that petitioner was exacting a bribe to compromise a liability rather than an extra fee to perform his duty.

2. The evidence was clearly sufficient to support the finding that petitioner was guilty of unlawfully mutilating a public document within the meaning of 18 U.S.C. 2071. Petitioner admittedly tore his name

from the document, and the jury could infer intent from the fact that the affidavit of Mrs. Thompson, which contained information incriminating Captain Lohse, was being carried, together with other Service documents pertaining to Lohse, in petitioner's car at a time when he was attempting to collect a bribe and that it was mutilated when petitioner feared discovery. Moreover, petitioner admitted that he also asked Captain Lohse to destroy Mrs. Thompson's copy (R.I. 168).

3. The introduction into evidence of a miniphone recording did not violate petitioner's constitutional rights against illegal search and seizure. The recording was made by Captain Lohse, who testified as to the details of the conversation. Lohse was in petitioner's car at petitioner's invitation. The miniphone recording was proper evidence to corroborate Lohse's testimony. *Lopez* v. *United States*, 373 U.S. 427, 437–440, 442. There was also expert testimony that the quality of the recording was good (R.I. 92).

4. Petitioner objected at trial to the government's use of a written transcript of the recording in cross-examination and in closing argument. This transcript was not introduced into evidence but was prepared for the convenience of both counsel. The use to which it was put by government counsel could not have prejudiced petitioner. During the government's summation, the court instructed the jury to use its own recollection of the recording and not the statement of government counsel as to what it contained (R.I. 185, 188–189).

5. Petitioner's contention that the court's instructions as to the presumption of innocence and reasonable doubt were erroneous must be rejected because he took no exceptions to the instructions (R.I. 206). In any event, the charge was a clear, fair and accurate statement of the applicable legal principles.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964